CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

NO. 464

INTERSTATE MOTOR FREIGHT SYSTEM, a Michigan Corporation, Petitioner,

v.

MARY MATILDA DUBROCK, Surviving Wife of LEVI FREDERICK DUBROCK, Deceased, as Trustee for Herself and Her Five Minor Children, MARGARET DUBROCK, MAMIE DUBROCK, CALVIN DUBROCK, RICHARD DUBROCK and GERALD DUBROCK, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Interstate Motor Freight System, a Michigan corporation, respectfully petitions your Honorable Court that a Writ of Certiorari issue to review the decision and judgment of the United States Circuit Court of Appeals for the Third Circuit, entered June 16, 1944, affirming the judgment of the District Court of the United States for the Western District of Pennsylvania, entered January 6, 1944, in favor of the Plaintiff-Respondent, and against the Defendant-Petitioner.

Opinions Below.

The opinion of the United States District Court is printed at pages ..... of the record, and is unreported.

The opinion of the Circuit Court of Appeals is printed at pages ..... of the record, and is reported in C. C. A. 143 Fed. (2d) 304.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered June 16, 1944.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 (Sec. 347 of Title 28 USCA).

Questions Presented.

1. Should the judgment in favor of the respondent be set aside and judgment entered in accordance with petitioner's motion for a directed verdict, where the respondent's evidence shows that the respondent's deceased husband in the afternoon of a clear day was operating an automobile in an easterly direction on a three lane highway, and was making a turn to his left in order to leave the highway upon an intersecting road; and that the truck of the petitioner traveling in a westwardly direction, when about 100 or more feet from the intersection had turned from the northern lane of a thirty-three foot highway to the center lane in order to pass behind the automobile making the turn in front of it; and that thereafter the deceased turned back toward his right of the highway when the truck was 20 to 40 feet away and the two vehicles crashed

virtually head-on approximately in the middle lane of the highway?

2. Is the petitioner entitled to a new trial where the Trial Court refused to charge the jury as requested by the petitioner on the doctrine of proximate cause and where the most important element in the case was the question as to what was the proximate cause of the accident?

3. Is the petitioner entitled to a new trial by reason of the Trial Court's charge to the jury that if respondent's husband gave sufficient warning of intention to turn into an intersecting road, the duty rested upon the driver of the truck to bring his truck to a stop under the laws of Pennsylvania?

Statement.

This was an action in trespass originally instituted in the Court of Common Pleas of Armstrong County, Pennsylvania, by the respondent against the petitioner for damages suffered by the respondent by reason of the death of Levi Dubrock, deceased husband of the respondent. The action was removed by the petitioner to the District Court of the United States for the Western District of Pennsylvania. The case was tried in the District Court of the United States for the Western District of Pennsylvania and the jury returned a verdict in favor of the respondent and against the petitioner in the sum of $8,000. The judgment was affirmed by the District Court of the United States for the Western District of Pennsylvania and by the Circuit Court of Appeals for the Third Circuit.

The facts which give rise to the important questions here presented are wholly undisputed and came from evidence produced by the respondent and may be briefly stated as follows:

On November 14, 1941, at about 2:00 o'clock P. M., on a bright clear day, Levi Dubrock, deceased husband of the respondent—accompanied by a friend, Mrs. Moaney—was operating an automobile in an easterly direction on Pennsylvania State Highway Route No. 422 near Kittanning, Pennsylvania. Route 422, at the scene of the accident, is a three lane concrete highway, 33 feet wide, being divided into three lanes of 11 feet each. The road at the location of the accident was straight and practically level for a distance of approximately 1000 feet. On the north side of Route 422, at the scene of the accident, is a connecting dirt road and garage. The deceased intended to make a turn to his left, off Route 422 onto the intersecting dirt road, and when first noticed by two witnesses called by the respondent, he was angling to his left with the left wheels of his automobile either in or about to enter the most northerly third of Route 422. As Dubrock was turning to his left, the same respondent's witnesses noticed the truck of the petitioner traveling in a westerly direction at approximately 40 miles per hour turning from the northerly lane of Route 422 to the center lane. The two vehicles at that time were approximately 100 feet apart. One of the respondent's witnesses called to the deceased, with whom he was acquainted, to look out or get out of the road and the deceased then, instead of continuing off the road to his left—where he would have been perfectly safe—suddenly turned to his right when the truck was 20 to 40 feet away and started back toward the southerly side of Route 422, turning back into the center

lane of the highway and directly into the path of the petitioner's truck. The airbrakes on the truck broke when the vehicles collided and the truck continued some distance down the road.

At the time of the impact according to evidence produced by respondent's witnesses and by the photographs offered in evidence the left hand wheels of the truck of the petitioner were approximately at the dividing line between the center lane and the southerly lane and the two vehicles met practically head-on.

The position of the respondent raises three questions which are clearly within the provisions of Section 240 of the Judicial Code as amended, and within the provisions of Rule 38-5(b) of this Court for the reason that the decision of the Circuit Court of Appeals is contrary to the decisions of this Court, of other Circuit Courts of Appeal and even contrary to a decision of the Circuit Court of Appeals for the Third Circuit.

I. The first question raised is whether under the evidence in the case respondent is entitled to have the case submitted to a jury when the evidence revealed that the proximate cause of the accident was the operation of Dubrock's car. The testimony with regard to the happening of the accident all came from witnesses called by the respondent. There were two eye witnesses to the accident, namely, Reese W. Jenkins, Jr., and Paul Dosch, Jr. Their testimony definitely shows that the sole and proximate cause of the accident was the operation of the car by Levi Dubrock. Their testimony shows definitely that Levi Dubrock was proceeding in an easterly direction on a thirty-three foot highway on the afternoon of November 14, 1941, where the weather conditions were good, and at the point where the acci-

dent occurred the road is straight and practically level and there was visibility for a thousand feet. Dubrock was proceeding in the center lane of traffic and was intending to turn off the highway onto a dirt road to his left. When the two witnesses who were standing near the intersection saw the truck of the petitioner proceeding in an easterly direction at a speed of about forty miles an hour and turning from the northerly lane to the center lane the car which Dubrock was operating was turning to the left from the center lane to the easterly lane and proceeding at about twenty miles an hour. When the truck was about twenty to forty feet away from Dubrock's car one of the witnesses called to Dubrock and Dubrock then swung to his right back into the center lane of traffic and the car and truck collided almost head-on in the center lane. It is obvious that Dubrock was not paying attention to the road ahead of him.

We submit that there was only one cause for this accident and that was the action of Dubrock, who instead of continuing on into the northerly lane of traffic and off the highway suddenly and without any warning turned back to the center lane of traffic directly in front of the petitioner's truck. We submit that the District Court and the Circuit Court should have held under the decisions of this Court that the sole and proximate cause of the accident was the action of Dubrock in the operation of his car.

There is no fundamental difference between the case at bar and the case of *Atlantic Coast Line Railroad Company v. Driggers,* 279 U. S. 787, where the facts show that Driggers, who was a railroad brakeman, swung from a train on which he was riding directly into the

path of a train proceeding in the opposite direction and was killed. The negligence complained of in this case was that the oncoming train was being operated at a high and dangerous rate of speed. This Court held as follows:
(p. 792)

> "The rate of speed at which the passenger train was running was, plainly, not a proximate cause of the injury, as the engine of that train did not run into Driggers, but he, as the result of his own action, was thrown against the side of the engine as it was passing. See Patterson v. Director General 115, S. C. 390, 396."

II. The second question which your petitioner feels is of sufficient importance to allow a Writ of Certiorari in this case arises from the failure of the Trial Judge to charge the jury in accordance with the request of your petitioner. This request was as follows:

> "If the proximate cause of this accident was the deceased turning back toward the right side of the road when the truck had made its turn to pass behind it, then your verdict must be for the defendant."

The Trial Court refused to so charge and granted an exception to your petitioner, and in his opinion with respect thereto merely stated as follows:

> "We believe we previously covered this point by our general charge where we discussed this phase of the case."

The Circuit Court of Appeapls held that your petitioner was entitled to such a charge but that the Trial Court had satisfactorily and adequately covered this subject.

The portion of the opinion of the Circuit Court of Appeals dealing with this point is as follows:

> "From the cases cited by defendant, it is evident he had in mind a charge to the effect that even if the jury found defendant negligent no recovery could be had unless such negligence was also the proximate cause of the accident. There is no doubt under Pennsylvania Law that defendant would be entitled to such a charge. However, the trial judge satisfactorily and adequately covered this subject in the instruction: (R. 99) (12 a)
>
> > 'Now, in order to recover in this case the burden rests upon the plaintiff to show by the fair weight of evidence that the collision that resulted in the death of her husband was due to negligence on the part of the driver of this defendant's truck, and that must be shown by the fair weight of evidence.'
>
> and again (R. 101) (14 a):
>
> > 'If the truck driver was negligent and the collision resulted from the negligence of the truck driver, *and there was no contributory negligence on the part of Dubrock in the operation of his car, then the plaintiff ought to recover in this case.* * * *' (emphasis supplied)"

It is readily apparent that the Trial Judge did not charge on proximate cause. He was charging on negligence and contributory negligence. Obviously a charge on negligence did not submit to the jury the question of what was the proximate cause of the accident. There is no ruling of law which is more definitely settled and which has been imbedded in the law of negligence from the conception of the law of negligence than the doctrine

of proximate cause. This Court clearly stated this doctrine in the case of *Milwaukee and Saint Paul Railway Company v. Kellogg,* 94 U. S. 469 (1876). This was reaffirmed in the case of the *Atlantic Coast Line Railroad Company v. Driggers, supra,* and was definitely and affirmatively reiterated by the Circuit Court of Appeals for the Third Circuit in the case of *Warren v. Haines,* 126 Fed. (2d) 161, where the Court held as follows: (p. 162)

> "Proof of the defendant's negligence is not sufficient, however, to justify a verdict for the plaintiff. There must be evidence that the defendant's negligence was the determinative or proximate cause of the injury."

Clearly, it was not sufficient for the Trial Judge to have submitted to the jury merely the question of negligence and contributory negligence. He must go further and submit the question of what was the proximate cause of the accident and whether the negligence complained of was the proximate cause of the injury. It is readily apparent that this is a question of importance throughout the United States and it is important in the trial of every trespass or negligence case, and clearly the charge was not in conformity with the ruling of this Court or the rulings of the other Circuit Courts of Appeals or even of the Circuit Court of Appeals for the Third Circuit.

III. The third question presented raises the question of the interpretation of the statute of the Commonwealth of Pennsylvania. The Trial Court in its charge to the jury with regard to the duty of petitioner's driver at the intersection when he saw Dubrock give a sufficient warning of his intention to make a left turn

stated it was his duty to stop. The charge of the Trial Court was as follows:

> "If he gave a sufficient warning of his intention to turn into that road, then the duty would have rested with the driver of the truck to have brought his truck to a stop, so that Dubrock would have made his lefthand turn into this intersecting road. Dubrock being dead, there would be a presumption that he took the necessary precautions that he should have taken in order to make that lefthand turn."

The statute of Pennsylvania under which the Trial Court attempted to justify this portion of the charge is as follows:

> "Act of 1929, P. L. 905, Article 1013, its amendments and supplements, Purdon's Statutes Annotated 75, S. 572, Section B—
>
> (b) The driver of a vehicle, street car, or trackless trolley omnibus, approaching but not having entered an intersection, shall yield the right of way to a vehicle within such intersection or turning therein to the left across the line of travel of such first mentioned vehicle, provided the driver of the vehicle turning left has given a plainly visible signal of intention to turn as required in this act."

We submit that this is not the correct interpretation of this statute since the statute clearly states what the duty of the driver is, namely, to yield the right of way, which is exactly what your petitioner's driver did in this case. He drove his truck from the northerly lane into the center lane, leaving the entire northerly lane open for Dubrock's car. There is no case that we can find

in Pennsylvania stating that under the law of Pennsylvania, which is the law that should be applied to the case, it is the duty of every driver who sees a car ahead of him making a left hand turn to stop and allow the other car to proceed, where there is sufficient room for him to pass to the left of the oncoming car, particularly where there is a designed and designated lane for passing.

Conclusion.

For the foregoing reasons it is respectfully submitted that this Petition should be granted.

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